Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1976

No. 77-33

EDDIE A. TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit And Request For Summary Reversal

GLORIA T. SVANAS
1813 East Eighth Street
Odessa, Texas 79761
Attorney for Petitioner.

SOUTHWESTERN LAW PRESS DALLAS, TEXAS (214) 742-3985

INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions and Statutes Involved 3

Statement of Facts 3

Reasons For Granting The Writ 6

1. The Government was required to prove beyond a reasonable doubt that Turner wilfully supplied false or fraudulent information to his employer on W-4 forms filed in 1972 and 1973 6

2. Turner was the victim of selective prosecution 13

Conclusion 18

Certificate of Service 19

APPENDIX

Appendix A — Opinion of the United States District Court for the Northern District of Texas, Lubbock, Texas A-1

Appendix B — Opinion of the United States Court of Appeals for the Fifth Circuit B-1

Appendix C — Employee's Withholding Allowance Certificate (Govt. Ex. A-2) C-1

Appendix D — 26 U.S.C. (I.R.C.) §3402 ..... D-1

Appendix E — Request to Clerk to Certify and Transmit Entire Record E-1

Index of Authorities

Cases — **Page**

Barenblatt v. United States, 360 US 109, 3 L.Ed. 2d 1115, 79 S.Ct. 1081 (1959) 10

Brown v. United States, 362 US 148, 2 L.Ed. 2d 589, 78 S.Ct. 622 (1958) reh. den. 7

Dixon v. District of Columbia, 129 US App. DC 341, 394 F. 2d 966 (1968) 14

Gardner v. Broderick, 392 US 273, 279, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (1968) 7

Hobbs v. Thompson, 448 F.2d 456, 470 (5th Cir. 1971) 14

Marchetti v. United States, 390 US 39, 19 L.Ed. 2d 889, 88 S.Ct. 697 (1968) 8

Mullaney v Wilbur, 421 US 468, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975) 9

Oyler v. Boles, 368 US 448, 456, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962) 14

Quercia v. United States, 289 US 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) 13

Speiser v. Randall, 357 US 513, 526, 78 S.Ct. 1332. 2 L.Ed. 2d 1460 (1958) 14

United States v. Malinowski, 472 F. 2d 850, (3rd Cir. 1972 cert. den.) 8

United States v. Oaks, 508 F. 2d 1403 (9th Cir. 1974 cert. den.) 15

United States v. Pomponio, ...US....., 50 L.Ed. 2d 12, 16, 97 S.Ct. ..... (1976) 11

United States v. Smith, 487 F. 2d 329 (9th Cir. 1973 cert. den.) 8

United States v. Steel, 461 F. 2d 1148 (9th Cir. 1972) 15

Index of Authorities—(Continued)

Cases — **Page**

Winship, In re: 397 US 358, 25 L.Ed. 2d 368 90 S.Ct. 1068 (1970) 9

Yick Wo v. Hopkins, 118 US 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1896) 14

Constitutional Provisions:

United States Constitution:

First Amendment 9

Fifth Amendment 7

Fourteenth Amendment 14

Statutes:

Federal Statutes:

26 U.S.C. (I.R.C.) §3402 3

26 U.S.C. (I.R.C. 1954) §7205 3

28 U.S.C. §1254(1) 2

Miscellaneous:

Internal Revenue Manual No. 9551.3 of Examples of Sensitive Cases or Situations with excerpt from the Manual Supplement United States Treasury Department Internal Revenue Service 95G-50 dated August 14, 1973 15

1 Wharton's Criminal Law and Procedure §157 (Cum.Supp. 1974) 9

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EDDIE A. TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to The
United States Court of Appeals
For the Fifth Circuit
And Request For Summary Reversal

Petitioner, Eddie A. Turner, prays that Writ of Certiorari issue and requests Summary Reversal of the Judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on June 3, 1977.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Texas, Lubbock Division, is unreported and appears at Appendix A, infra, pages A-1 to A-1). The Opinion

of the United States Court of Appeals for the Fifth Circuit is unreported and appears at Appendix B, infra, pages B-1 to B-3.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1977. Appendix B, infra. Rehearing was not sought. This Petition for Certiorari is filed less than thirty (30) days. The jurisdiction of this Court is invoked under *28 USC §1254(1).*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the statutory element of "willfulness" in *IRC §7205* mandate that the prosecution prove not only that Defendant acted with knowledge he was breaching the statute, but also that the W-4 allowance certificates as filed were false or fraudulent?
2. Whether there was a fatal variance in the indictment which tracked *IRC §3402* as to claiming exemptions although the IRS had made substantial changes in the procedure and forms required by the statute prior to the date of the filing of the forms charged to be false or fraudulent when the substantial changes in the forms included the additional authority of claiming allowances for itemized deductions in addition to claimed exemptions for family members?
3. Whether the prosecution proved Defendant wilfully supplied false or fraudulent W-4 allowance certificates as charged by the Court in the absence of any proof of non-eligibility for the claimed allowances?
4. Whether selective prosecution for vocal opposition to the

income tax laws is sufficient to support a conviction for wilfully filing false or fraudulent allowance certificates?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Constitution of the United States, Amendment 5:

> "No person shall . . . be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; . . ."

26 USC (I.R.C. 1954) §7205:

> "Any individual required to supply information to his employer under section 3402 who wilfully supplies false or fraudulent information, or who wilfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both. Aug. 16, 1954, C.736, 68A Stat. 852; March 15, 1966, Pub. L 89-368, Title I, §101(e) (5), 80 Stat. 62.

26 USC (I.R.C.) §3402:

> Appendix D.

STATEMENT OF FACTS

Eddie A. Turner was convicted in the United States District Court for expressing his opinions against the income tax laws. This was accomplished by indictment under *26 USC (I.R.C.) §7205.* This is not a tax evasion case, and there was no evidence Turner owed the Government any income taxes. In fact, there is

no evidence Turner wilfully supplied false or fraudulent information.

Eddie A. Turner was indicted on January 16, 1974, on two counts of violation of §*7205* Internal Revenue Code; *26 USC §7205*. The indictment Count 1 alleged the signing and filing of a false and fraudulent withholding exemption certificate relating to the number of exemptions claimed in the year 1972; Count 2 alleged the signing and filing of a false and fraudulent withholding exemption certificate relating to the number of exemptions claimed in the year 1973. The indictment further alleged in each instance that Mr. Turner was entitled to claim only four (4) withholding exemptions. Actually, Turner was prosecuted on Employee's Withholding Allowance Certificate. [Govt. Ex. A-2 — Appendix C (Revised August 1972)].

Eddie A. Turner proceeded pro se after his Motion for Counsel of Choice was repeatedly denied by the trial Court.

The only evidence presented by the Government were five (5) witnesses who identified Eddie A. Turner as employed by Central Plains General Hospital in Plainview, Texas, as a Certified Registered Nurse Anesthetist from July, 1971 until April, 1973. Mr. Oscar Franklin Butlar, Jr., testified he was the Internal Revenue Agent in Plainview from 1960 to date with duty to examine income tax returns. He stated Turner came to the Plainview IRS office in the Fall of 1972 to secure a W-4-E form for which Turner was not qualified so Mr. Butlar offered him a W-4 form which he identified as Employee's Exemption Certificate, but which is an Employee's Withholding Allowance Certificate. (Govt. Ex. A-2 which appears at Appendix C, infra, page C-1). On direct examination Mr. Butlar further testified in response to the question of what instruction was given to Turner concerning Government's Exhibit A-2:

> "I stated that if he had enough deductions that he would owe no tax. He would need to fill out the back of the form for his itemized deductions, and if they exceeded the chart as shown, he would be entitled to claim additional allowances."

There was no discussion between Turner and Butlar of the number of allowances Turner was eligible to claim. Mr. Butlar showed Turner the schedule for computing the "additional allowances" and the special withholding allowance and the Table on the instruction sheet. The new instructions for W-4 forms for allowances were read to the jury from Turner's Exhibit 2. Mr. Butlar also explained "other allowances", but Mr. Butlar did not testify or offer any evidence of the allowances to which Turner was eligible.

Mrs. Mildred I. Smith, Personnel and Payroll Officer at Central Plains General Hospital in Plainview testified concerning Turner's identity, employment and salary at the times in question. Mrs. Smith stated the hospital records showed at the time of employment, Turner was married and had two children, but she stated she did not check on allowances. Mrs. Smith testified at length concerning the referral to legal counsel of the W-4 forms filed by Turner, but she, on the advice of the hospital Administrator and legal counsel for the hospital, did NOT refuse to accept the allowance certificates.

Over objection, Mrs. Smith was permitted to testify to conversations with Turner concerning Turner's personal opinions against deductions from his wages for income tax.

Mr. Whitelaw H. Hunt, Chief Executive Officer of Central Plains General Hospital testified to Turner's employment and oral discussions at the time of Turner's filing of the questioned

W-4 forms. Mr. Hunt reiterated the referral of these forms to legal counsel for the hospital, and he also restated the acceptance of the W-4 forms by the hospital as Turner's employer. Again, Mr. Hunt testified about Turner's expression of personal opinions od the constitutionality of taxes and read to the jury Turner's letter (undated) stating Turner's personal opinions regarding withholding taxes and income taxes. Mr. Hunt offered no testimony or evidence concerning Turner's eligibility for withholding allowances. On cross-examination Mr. Hunt stated he did not know Turner's tax liabilities.

Mrs. Laura Opal Howard, the Operating Room Supervisor at Central Plains General Hospital, testified only to discussions concerning Turner's claims of "dependents" and her testimony is devoid of any evidence of the number of allowances to which Turner was entitled.

Mrs. Joyce Jan Barton Hamilton testified only to a discussion in the small dining room of the hospital about withholding taxes and statements by Turner stating:

> ". . . I think we were all joking about it and it was taken in that light."

Mrs. Hamilton gave no testimony or evidence of the allowances to which Turner was eligible.

REASONS FOR GRANTING THE WRIT

1. **The Government was required to prove beyond a reasonable doubt that Turner wilfully supplied false or fraudulent information to his employer on W-4 forms filed in 1972 and 1973.**

The Record is not sufficient to prove the essential element of knowledge or wilfullness beyond a reasonable doubt, and there is no evidence of false or fraudulent W-4 forms supplied to his employer. The Government did not prove the W-4 forms were

false or fraudulent because there was no evidence of Turner's non-eligibility for the claimed allowances.

Turner filed the Government forms for allowances as required by law. In a criminal prosecution for supplying false and fraudulent forms, to compel Turner to prove the allowances to which he was entitled would violate his constitutional right not to incriminate himself.

Turner was indicted and compelled to defend himself in the United States District Court, but he could not be constitutionally compelled to prove the Government's charges against him. The constitutional protection against compulsory self-incrimination is found in the *Fifth Amendment,* which provides in relevant part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

To effectively claim his *Fifth Amendment,* Turner culd not take the stand. Turner's conviction was the adverse consequence of his silence. *Brown v. U.S.,* 362 US 148, 2 L.Ed. 2d 589, 78 S.Ct. 622 (1958) reh. den. The mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of conviction without proof. *Gardner v. Broderick,* 392 US 273, 279, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (1968). This constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted. and if the Statute imposed on the claimant a choice of whether he wished, at the cost of his constitutional privilege, to claim allowances on the W-4 form, and if such inference of antecedent choice were alone enough to abrogate the privilege's protection, the privilege would be excluded from situations in which it had

historically been granted and would be withheld from those who most required it. *Marchetti v. U.S.*, 390 US 39, 19 L.Ed. 2d 889, 88 S.Ct. 697 (1968).

The case sub judice is clearly distinguishable from *United States v. Smith*, 487 F.2d 329 9th Cir. 1973, cert. den., in which the three Defendants accused of violation of *26 USC §7205* sent letters to the Internal Revenue Service stating they had inflated their number of dependents to prevent their wages from being illegally seized. The only evidence produced by the Government was that Turner had changed his W-4 allowance form when the Government revised its forms in August 1972, and that he made such revisions strictly in compliance with the instructions prepared and submitted by the IRS and after conversation with Mr. Butlar, the Internal Revenue Agent.

U.S. v. Malinowski, 472 F.2d 850, 3rd Cir. 1972 (cert. den.) is also distinguishable on the facts because *Malinowski* entered into a stipulation admitting he was not eligible under Internal Revenue standards for the fifteen exemptions which he claimed. There is no stipulation concerning Turner's eligibility. There is no evidence of the number of allowances to which Turner was entitled so there is no proof Turner violated any law because there is no proof he filed or supplied a false or fraudulent statement. Arguably, the thirty allowances claimed by Turner are not an inconceivable number in view of the fact that withholding allowances may be claimed *both* on the basis of family members and the amount of itemized deductions allowed by the Statute. *26 USC (I.R.C.) §3402.*

The statutory element of "false or fraudulent" mandates the prosecution to prove beyond a reasonable doubt that Turner was

not eligible to claim the thirty exemptions. This proof is not supplied by Turner's expression of opinions or letters which are constitutionally protected under the *First Amendment*.

This Court has often recognized the constitutional stature of rights that though not literally expressed in the document, are essential to due process of law in a fair adversary process and particularly the right to be convicted *only* if his guilt is proven beyond a reasonable doubt. *In re: Winship*, 397 US 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 US 684, 44 L.Ed 2d 508, 95 S.Ct. 1881 (1975).

It is a fundamental tenet of criminal law that an honest mistake of facts negates criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be. A Defendant's error as to his authority to complete the W-4 forms in a particular manner, if based on a mistaken view of legal requirements is a mistake of law. *1 Wharton's Criminal Law and Procedure §157* (Cum. Supp. 1974). The claiming of allowances as provided for on the Government form is no more a crime than transferring properties to a foundation to avoid income taxes. There is no proof that Turner knowingly by voluntary action failed to perform his legal obligation to file the form in any other manner. Obviously, he had no legal obligation to authorize the withholding of taxes for which he was not obligated to pay under the law. Based on the Record, the trier of facts should have found a reasonable doubt whether the forms were false or fraudulent. The Record seems to suggest understandable pique in the Internal Revenue Service because of Turner's loud and repeated criticisms of the income tax laws, but this criticism is not sufficient to prove that Turner supplied a false or fraudulent form. Historically, there has always been a tendency of

American's officialdom to view any challenge to authority as a crime. Those with political power, frightened and confused by dissent and unorthodoxy have just as frequently tried to use the criminal process to control American political life and dissent.

The Record is clear that the Internal Revenue Service issued new W-4 forms in August 1972 together with specific instructions to the Employer in advising his Employees and further instructions to the Employee to consult with the Internal Revenue Service in the event of questions. As stated by Mr. Justice Black in his dissent in *Barenblatt v. U.S.*, 360 US 109, 3 L.Ed 2d 1115, 79 S.Ct. 1081 (1959), it is unthinkable to convict a man for violating a law he could not understand. Furthermore, it is unthinkable to convict a man without sufficient proof that a crime has been committed.

The mere filing of W-4 withholding allowance certificates is not proof that such information is false or fraudulent. Whatever Turner's beliefs are concerning the withholding laws, the fact remains that the hospital-emloyer did accept the two W-4 allowance certificates without question, and there is absolutely no evidence that the two allowance certificates supplied false or fraudulent information about anything. Actually, the Government's whole case against Turner was based on Turner's expression of his beliefs. The Government cannot escape the requirement that in a criminal action it must prove the guilt of the Defendant beyond a reasonable doubt, and that the Defendant is not only entitled to the presumption of innocence, but he is protected against compulsory self-incrimination. The United States Government has no constitutional right to presume any accused into the penitentiary. The Government cannot shift the burden of the defense to Turner in a criminal prosecution. The evidence to convict Turner did not meet the standard of

wilfullness delineated by this Court to be a voluntary intentional violation of a known legal duty. *United States v. Pomponio*, ...US.... , 50 L.Ed. 2d 12, 16, 97 S.Ct. ....(1976).

The Statute requires the filing of W-4 allowance certificates by an Employee with his Employer. This filing claiming any number of allowances is not a criminal act unless the certificate is proved wilfully false or fraudulent.

The Government did not offer into evidence the 1972 tax return filed by Turner or the 1973 income tax return filed by Turner, either of which was the only conclusive proof of the falsity, if any, of the W-4 allowance withholding certificate for the specific year in question. The Government had these returns. If the returns would have disproved the accusations contained in the indictment, then it is perfectly clear why these income tax returns were not placed in evidence.

The refusal of the Government to introduce the sworn income tax returns of the accused as proof of the false or fraudulent W-4 withholding certificates as alleged in the indictment raises the irrebuttable presumption that the returns were not introduced because they would prove the W-4 allowance certificates as alleged in the indictment were not false or fraudulent. The prosecution made no attempt to prove the allowances to which Mr. Turner was entitled nor to prove the falsity of the W-4 allowance forms by proving the exemptions and the itemized deductions actually taken by Mr. Turner on his income tax return for that particular year.

Mr. Turner pro se succinctly paraphrased the two day trial culminating more than 37 months of investigation and pre-trial when he told the jury in closing argument:

"I have fought the good fight and I have no defense because the Government has not proved anything."

The Court's charge is fundamental error for failing to adequately and correctly charge the Jury on "reasonably determinable itemized deductions for the instant year." (R-251-262 at 258) The charge continues "determinable itemized deductions mean those estimated itemized deductions which are demonstrably attributable to an identifiable event which can reasonably be expected to increase the amount of itemized deductions claimed by an employee on his tax return."

This instruction clearly and unequivocably places the burden on the accused to show those estimated itemized deductions which are demonstrably attributable to an identifiable event which can reasonably be expected to increase the amount of itemized deductions claimed by an employee on his tax return which is not returnable until April 15th following the end of the instant year. Taking the Court's charge as a whole, the prefunctory statements of presumption of innocence and burden of proof do not overcome the requirement of the charge that the accused present proof of his computations of the W-4 form of determinable itemized deduction. Mr. Butlar, the IRS agent, as the Government's witness, testified that Government's Exhibit A-2 (Appendix C), the bottom third of the page is a perforated section of the form that is completed by the Employee and given to the Employer: He (employee) puts his name, address, city, his marital status, his social security number and the amount of dependents he is claiming and any additional amounts of withholding that he wants to be withheld. The form required to be filed by the statute did *not* require a reported computation of the reasonably determinable itemized deductions for the instant

year, but such deductions were properly allowable under the forms. The claiming of the reasonably determinable itemized deductions for the instant year did not constitute a violation of the statute unless the Government sustained its burden of proof that the information supplied was wilfully false or fraudulent. The statutory provisions for allowances for "reasonably expected allowances for the current year" and "additional allowances" were not met with proof by the Government and required the entry of judgment of acquittal by the trial Court.

The charge to the jury cannot be justified by any judicial interpretation of the prejudicial seven times repetition of the words "wilfully supply a false and fraudulent statement" because no facts were proved on which to base a jury finding of "wilfully supply a false and fraudulent statement" and the seven times repetition irrevocably stamped the wording on the minds of the jurors as is shown by a total nineteen minute jury deliberation. The additional instructions of circumstantial evidence allowed the jury without reason or thinking and without evidence to adopt the seven times repeated "wilfully supply a false and fraudulent statement" and return a guilty verdict.

The charge to the jury constituted fundamental error because it charged the jury on a supposed or conjectural set of facts unsupported by the evidence presented. *Quercia v. United States*, 289 US 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933).

2. **Turner was the victim of selective prosecution.** Turner was prosecuted for his expressed opinions about the Federal income tax laws. It is clear the Government may not control the conduct of a person for reasons that infringe upon constitutionally guaranteed freedoms. The approval of such restrictive action would permit the Government to produce a result which it could

not command directly. *Speiser v. Randall,* 357 US 513, 526, 78 S.Ct. 1332, 2 L.Ed 2d 1460 (1958). This prosecution was to control Turner's expression of his opinions about the income tax laws. Government regulations and restriction on the exercise of *First Amendment* freedoms should not lightly be imposed. *Hobbs v. Thompson,* 448 F.2d 456, 470, 5th Cir. 1971.

Prohibition against selective prosecution is applicable to federal prosecution. *United States Constitution Amendment V, XIV.* Selective prosecution was first recognized as violative of the *Fourteenth Amendment* in *Yick Wo v. Hopkins,* 118 US 356, 6 S.Ct. 1064, 30 L.Ed 220 (1896). This prohibition has since been extended to federal prosecutions through the *Fifth Amendment. Dixon v. District of Columbia,* 129 US App. DC 341, 394 F.2d 966 (1968). In *Yick Wo* the Court was concerned with "unjust and illegal discriminations between persons in similar circumstances." 118 US at 374, 6 S.Ct. at 1073. It is not all selective enforcement that is forbidden, but that which is based on some unjustifiable standard such as race, religion or other arbitrary classification. *Oyler v. Boles,* 368 US 448, 456, 82 S.Ct. 501, 7 L.Ed 2d 446 (1962). Vocalized opposition to the income tax laws is just such an arbitrary classification. On May 12, 1975, Turner filed his Motion for Dismissal on grounds that he was being "subjected to prosecution in a discriminate manner for political reasons and for the reason that he has espoused in public, in the exercise of his right to freedom of speech, press, expression , assembly and petition, as guaranteed by the *First and Fourteenth Amendments to the United States Constitution,* his opposition to the federal tax laws, federal tax policies, and the unconstitutional money system in effect in the United States, for the purpose of "chilling" Turner's and others' rights to free speech

and expression, assembly and petition, and that, for these reasons, Defendant had been singled out for prosecution. *United States v. Oaks,* 508 F.2d 1403, (9th Cir. 1974) cert. den.; *United States v. Steel,* 461 F.2d 1148 (9th Cir. 1972) and citing *Internal Revenue Manual No. 9551.3 of Examples of Sensitive Cases or Situations* with the following excerpt from the *Manual Supplement United States Treasury Department Internal Revenue Service 95G-50* dated August 14, 1973:

"Our objective is to deter the widespread use of tax non-compliance as a means of protest. We believe a *selective approach,* rather than a large scale national project, is the most effective and efficient way to achieve this objective. Therefore, primary emphasis will be placed on the identification and investigation of cases in which prosecution will result in the maximum contribution to this objective. These cases will normally be those involving flagrant violations and those involving violations by *individuals who have achieved notariety as tax protestors.* Such cases usually provide a vehicle for extensive coverage which alerts a large segment of the tax paying public to the consequences of non-compliance. The publicity aspects of course, require a close working relationship with the public information officers." (R-93)

The publicity aspects are evidenced by Defendant's Exhibit D-4, published in the *Lubbock Avalance Journal* Tuesday evening, December [illegible], 1975, page 10a, and Defendant's Exhibit 5, published in the *Lubbock Avalance Journal,* Wednesday morning, December 17, 1975, page 12e, referring to "Testimony Opens in Tax Case — Testimony began this morning in the Government's tax evasion case against Eddie A. Turner of Hale Center . . . since being charged with tax evasion . . . ". The public

relation officer had taken poetic license to meet the required publicity aspects.

The testimony of the four Government witnesses, all of whom were employed by the Central Plains General Hospital in Plainview, Texas, where Turner had been employed during the periods in question, each testified to conversations with the accused concerning his personal opinions in his opposition to the Federal tax laws. The Government failed to ask a single one of the witnesses if they knew whether or not Turner filed an income tax return, but more importantly, the Government failed to ask a single witness whether or not he or she knew how many allowances Turner was entitled to at the time the specified allowance certificate was filed. Non-eligibility is the necessary element to conviction.

Another startling example of the selective prosecution perpetrated in the trial Court was the introduction and reading to the jury of the undated letter (R-102-103) from Turner to the Government witness, Hunt, because such letter makes no mention whatsoever of the filing of the W-4 form specified in the indictment.

The trial Court having failed to order an evidentiary hearing on the Motion to Dismiss for Selective Prosecution (*US v. Oaks,* 508 F.2d 1403, 9th Cir. 1974, cert. den.) could have corrected its error as a matter of law at the conclusion of the Government's case. The only testimony before the Court concerned the protests by the accused against the Federal taxing laws. Instead, the trial Court magnified its error when it held:

> "The Court: Well, I think your letter that is in evidence expressly makes that statement and I think your statements before the jury in opening argument and throughout the

> course of the testimony clearly set out in the Record, so I'll overrule your objection." (Tr. 285 1.9-14).
>
> Turner did not give any testimony.

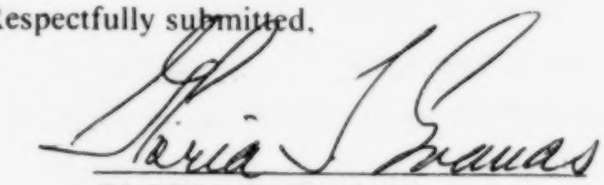
This erroneous finding by the court that a pro se Defendant's opening statement before the jury is evidence coupled with the Court's failure to distinguish between protesting income tax and the filing of allowance certificates as two separate and distinct acts in each instance irrevocably concludes that the IRS acting through a Government prosecutor had indeed found "the identification and investigation of cases in which prosecution will result in the maximum contribution to this objective."

It is not difficult to understand the jury's confusion and inability to separate the protestor as prosecuted from the accused as indicted and failing to make such distinction within 19 minutes total lapsed time finding the accused guilty as charged. The IRS had selectively chosen an aggressive, loud-mouth organizer of tax protestors, and the objective to deter the widespread use of tax non-compliance had been achieved in the most effective and efficient way albeit without any evidence of the crime charged.

CONCLUSION

The Judgment below is an abrupt departure from decisions of this Court which require that the guilt of the Defendant be proved beyond a reasonable doubt. As such, it represents a deviation from the constitutional guarantees designed to protect a citizen from being convicted by his Government for his criticism of the tax laws, and in the absence of evidence of his guilt beyond a reasonable doubt. This Petition for a Writ of Certiorari should therefore be granted and Summary Reversal should be entered.

Respectfully submitted,



GLORIA T. SVANAS

1813 E. Eighth Street
Odessa, Texas 79761
Telephone: 915/337-1568

Attorney for Petitioner,
Eddie A. Turner

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT on this *1st* day of July 1977, three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Request for Summary Reversal have been placed in the United States mail, postage prepaid, addressed to the following:

Mr. Roger L. McRoberts
Assistant United States Attorney
Room C-201, 1205 Texas Avenue
Lubbock, Texas 79041

GLORIA T. SVANAS

APPENDIX A

United States District Court
for Northern District of Texas
Lubbock Division
Docket No. CR-5-74-5
United States of America
v.
Eddie A. Turner
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on January 14, 1976, without counsel but counsel appointed as stand-by counsel was present in courtroom, but not at counsel table.

Plea — NOT GUILTY to Counts 1 and 2 of the indictment.

FINDING & JUDGMENT

There being a JURY verdict of GUILTY to Counts 1 and 2 of the indictment.

Defendant has been convicted as charged of the offense(s) of Subitting False and Fraudulent Withholding Exemption Certificate to Employer in violation of Title 26 USC 7205 in Counts 1 and 2 of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on Count 1 of the indictment, and on condition that the defendant be confined for a period of SIX (6) MONTHS in a jail-type institution, the execution of the remainder of the sentence of 6 months of imprisonment is hereby suspended and the defendant placed on probation for a period of SIX (6) MONTHS upon the condition that said defendant pay a fine of $500.00 to the United States.

IT IS ADJUDGED that Imposition of sentence on Count 2 of the indictment is hereby suspended and the defendant placed on

probation for a period of ONE (1) YEAR. Such period of probation to be consecutive to the term of imprisonment imposed on Count 1.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Signed by U.S. District Judge Robert W. Porter January 14, 1976.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-1240
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDDIE A. TURNER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(June 3, 1977)

BEFORE TJOFLAT and HILL, Circuit Judges, and PATRICK E. HIGGINBOTHAM,** District Judge.

PER CURIAM:

In January 1974, appellant Eddie A. Turner was indicted on two counts of *wilfully supplying false and fraudulent withholding certificates to his employer in violation of 26 U.S.C. §7205.* Trial was originally set for May 1974 before Judge Woodward of the Northern District of Texas; however, in April 1974 appellant was among the plaintiffs who filed an antitrust and civil rights suit against Judge Woodward and most of the other federal judges in the country.

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5 Cir. 1970, 431 F.2d 409 Part I.

**District Judge of the Northern District of Texas sitting by designation.

On appellant's motion Judge Woodward recused himself, and the case was eventually reassigned to Judge Porter, who conducted a jury trial in December 1975. Appellant was found guilty on both counts.

Appellant argues that the indictment was fatally defective, that it was error for the trial court to deny his motions to dismiss for lack of speedy trial and selective prosecution, that his Sixth Amendment rights were violated by the lower court's refusal to allow him to be represented by a non-lawyer, that there was insufficient evidence to support a conviction, that the jury instructions were erroneous, and that for a number of reasons a mistrial should have been granted. A review of the record indicates that all these arguments are totally without merit.

AFFIRMED.

United States Court of Appeals
For The Fifth Circuit

No. 76-1240
Summary Calendar

District Court Docket No. CR-5-74-5

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDDIE A. TURNER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before TJOFLAT and HILL, Circuit Judges, and PATRICK E. HIGGINBOTHAM,** District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same hereby is, affirmed.

Issued as Mandate: June 22, 1977

**District Judge of the Northern District of Texas sitting by designation.

APPENDIX C

Employee's Withholding Allowance Certificate

The explanatory material below will help you determine your correct number of withholding allowances, and will indicate whether you should complete the new Form W–4 at the bottom of this page.

How Many Withholding Allowances May You Claim?

Please use the schedule below to determine the number of allowances you may claim for tax withholding purposes. In determining the number, keep in mind these points: If you are single and hold more than one job, you may not claim the same allowances with more than one employer at the same time. If you are married and both you and your wife or husband are employed, you may not claim the same allowances with your employers at the same time. A nonresident alien other than a resident of Canada, Mexico or Puerto Rico may claim only one personal allowance.

Figure Your Total Withholding Allowances Below

(a) Allowance for yourself—enter 1 .....
(b) Allowance for your wife (husband)—enter 1 .....
(c) Allowance for your age—if 65 or over—enter 1 .....
(d) Allowance for your wife's (husband's) age—if 65 or over—enter 1 .....
(e) Allowance for blindness (yourself)—enter 1 .....
(f) Allowance for blindness (wife or husband)—enter 1 .....
(g) Allowance(s) for dependent(s)—you are entitled to claim an allowance for each dependent you will be able to claim on your Federal income tax return. Do not include yourself or your wife (husband) .....
(h) Special withholding allowance—if you have only one job, and do not have a wife or husband who works—enter 1 .....
(i) Total—add lines (a) through (h) above .....

If you do not plan to itemize deductions on your income tax return, enter the number shown on line (i) on line 1, Form W–4 below. Skip lines (j) and (k).

(j) Allowance(s) for itemized deductions—If you do plan to itemize deductions on your income tax return, enter the number from line 5 of worksheet on back .....
(k) Total—add lines (i) and (j) above. Enter here and on line 1, Form W–4 below .....

*If you are in doubt as to whom you may claim as a dependent, see the instructions which come with your first Federal income tax return or call your local Internal Revenue Service office.

See Table and Worksheet on Back if You Plan to Itemize Your Deductions

Completing New Form W–4

If you find that you are entitled to one or more allowances in addition to those which you are now claiming, please increase your number of allowances by completing the form below and filing with your employer. If the number of allowances you previously claimed decreases, you must file a new Form W–4 within 10 days. (Should you expect to owe more tax than will be withheld, you may use the same form to increase your withholding by claiming fewer or "0" allowances on line 1 or by asking for additional withholding on line 2 or both.)

▼ Give the bottom part of this form to your employer; keep the upper part for your records and information ▼

Form **W–4** (Rev. Aug. 1972) Department of the Treasury Internal Revenue Service

Employee's Withholding Allowance Certificate

(This certificate is for income tax withholding purposes only; it will remain in effect until you change it.)

Type or print your full name | Your social security number

Home address (Number and street or rural route) | Marital status ☐ Single ☐ Married (If married but legally separated, or wife (husband) is a nonresident alien, check the single block.)

City or town, State and ZIP code

1 Total number of allowances you are claiming .....

2 Additional amount, if any, you want deducted from each pay (if your employer agrees) ..... $

I certify that to the best of my knowledge and belief, the number of withholding allowances claimed on this certificate does not exist the number to which I am entitled.

Signature ▶ ..... Date ▶ ....., 19....

APPENDIX D

§ 3402 Income tax collected at source

(a) Requirement of withholding—Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. For purposes of applying such tables, the term "the amount of wages" means the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in the table in subsection (b)(1):

(Table Omitted)

(2) If wages are paid with respect to a period which is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(3) In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(4) In any case in which the period, or the time described in paragraph (3), in respect of any wages is less than one week, the Secretary or his delegate, under regulations prescribed by him, may authorize an employer to determine the amount to be deducted and withheld under the tables applicable in the case of a weekly payroll period, in which case the aggregate of the wages paid to the employee during the calendar week shall be considered the weekly wages.

(5) If the wages exceed the highest wage bracket, in determining the amount to be deducted and withheld under

this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(6) In the case of wages paid after December 31, 1969, the amount deducted and withheld under paragraph (1) shall be determined in accordance with tables prescribed by the Secretary or his delegate. In the tables so prescribed, the amounts set forth as amounts of wages and amounts of income tax to be deducted and withheld shall be computed on the basis of table 7 contained in paragraph (1), (2), (3), (4) or (5) (whichever is applicable) of subsection (a).

(d) Tax paid by recipient.—If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(e) Included and excluded wages.—If the remunerations paid by an employer to an employee for services performed during one-half or more of any payroll period of not more than 31 consecutive days constitutes wages, all the remuneration paid by such employer to such employee for such period shall be deemed to be wages; but if the remuneration paid by an employer to an employee for services performed during more than one-half of any such payroll period does not constitute wages, then none of the remunerations paid by such employer to such employee for such period shall be deemed to be wages.

(f) Withholding exemptions.—

(1) In general.—An employee receiving wages shall on any day be entitled to the following withholding exemptions:

(A) an exemption for himself;

(B) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(c)(1)(relating to old age)

for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

(C) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(d) (1) (relating to the blind) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

(D) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A), (B), or (C), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption;

(E) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonaly be expected to be allowable an exemption under section 151(e) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit; and

(F) any allowance to which he is entitled under subsection (m), but only if his spouse does not have in effect a withholding exemption certificate claiming such allowance.

(2) Exemption certificates.—

(A) On commencement of employment.— On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

(B) Change of status.—If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by the employee on the withholding exemption certificate then in effect with respect to him, the employee shall within 10 days thereafter furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which shall in no event exceed the number to which he is entitled on such day. If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is greater than the number of withholding exemptions claimed, the employee may furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which shall in no event exceed the number to which he is entitled on such day.

(C) Change of status which affects next calendar year.—If on any day during the calendar year the number of withholding exemptions to which the employee will be, or may reasonably be expected to be entitled at the beginning of his next taxable year under subtitle A is different from the number to which the employee is entitled on such day, the employee shall, in such cases and at such times as the Secretary or his delegate may by regulations prescribe, furnish the employer with a withholding exemption certificate relating to the number of withholding exemptions which he claims with respect to such next taxable year, which shall in no event exceed the number to which he will be, or may reasonably be expected to be, so entitled.

(3) When certificate takes effect.—

(A) First certificate furnished.— A withholding exemption certificate furnished the employer in cases in which no previous such certificate is in effect shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without

regard to a payroll period, on or after the date on which such certificate is so furnished.

(B) Furnished to take place of existing certificate.— A withholding exemption certificate furnished the employer in cases in which a previous such certificate is in effect shall take effect with respect to the first payment of wages made on or after the first status determination date which occurs at least 30 days from the date on which such certificate is so furnished, except that at the election of the employer such certificate may be made effective with respect to any payment of wages made on or after the date on which such certificate is so furnished; but a certificate furnished pursuant to paragraph (2) (C) shall not take effect, and may not be made effective, with respect to any payment of wages made in the calendar year in which the certificate is furnished. For purposes of this subparagraph, the term "status determination date" means January 1, May 1, July 1, and October 1 of each year.

(4) Period during which certificate remains in effect.— A withholding exemption certificate which takes effect under this subsection, or which on December 31, 1954, was in effect under the corresponding subsection of prior law, shall continue in effect with respect to the employer until another such certificate takes effect under this subsection.

(5) Form and contents of certificate.— Withholding exemption certificates shall be in such form and contain such information as the Secretary or his delegate may by regulations prescribe.

(6) Exemption of certain nonresident aliens.— Notwithstanding the provisions of paragraph (1), a nonresident alien individual (other than an individual described in section 3401(a) (6) (A) or (B) shall be entitled to only one withholding exemption.

(g) Overlapping pay periods, and payments by agent or fiduciary.—If a payment of wages is made to an employee by an employer—

(1) with respect to a payroll period or other period, any

part of which is included in a payroll period or other period with respect ot which wages are also paid to such employee by such employer, or

(2) without regard to any payroll period or other period, but on or prior to the expiration of a payroll period or other period with respect to which wages are also paid to such employee by such employer, or

(3) with respect to a period beginning in one and ending in another calendar year, or

(4) through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays, the wages payable by another employer to such employee,

the manner of withholding and the amount to be deducted and withheld under this chapter shall be determined in accordance with regulations prescribed by the Secretary or his delegate under which the withholding exemption allowed to the employee in any calendar year shall approximate the withholding exemption allowable with respect to an annual payroll period.

(h) Alternative methods of computing amount to be withheld.—The Secretary or his delegate may, under regulations prescribed by him, authorize—

(1) Withholding on basis of average wages.—An employer—

(A) to estimate the wages which will be paid to any employee in any quarter of the calendar year,

(B) to determine the amount to be deducted and withheld upon each payment of wages to such employee during such quarter as if the appropriate average of the wages so estimated constituted the actual wages paid, and

(C) to deduct and withhold upon any payment of wages to such employee during such quarter (and, in the case of tips referred to in subsection (k), within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted and withheld upon the wages of such employee during such quarter

to the amount required to be deducted and withheld during such quarter without regard to this subsection.

(2) Withholding on basis of annualized wages.—An employer to determine the amount of tax to be deducted and withheld upon a payment of wages to an employee for a payroll period by—

(A) multiplying the amount of an employee's wages for a payroll period by the number of such payroll period in the calendar year,

(B) determining the amount of tax which would be required to be deducted and withheld upon the amount determined under subparagraph (A) if such amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period, and

(C) dividing the amount of tax determined under subparagraph (B) by the number of payroll periods (described in subparagraph (A)) in the calendar year.

(3) Withholding on basis of culmutive wages.—An employer, in the case of an employee who requests to have the amount of tax to be withheld from his wages computed on the basis of his cumulative wages, to—

(A) add the amount of the wages to be paid to the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year,

(B) divide the aggregate amount of wages computed under subparagraph (A) by the number of payroll periods to which such aggregate amount of wages relates,

(C) compute the total amount of tax that would have been required to be deducted and withheld under subsection (a) if the average amount of wages (as computed under subparagraph (B)) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed under subparagraph (A)) relates,

(D) determine the excess, if any, of the amount of

tax computed under subparagraph (C) over the total amount of tax deducted and withheld by the employer from wages paid to employee during the calendar year, and

(E) deduct and withhold upon the payment of wages (referred to in subparagraph (A)) to the employee an amount equal to the excess (if any) computed under subparagraph (D).

(4) Other methods.— An employer to determine the amount of tax to be deducted and withheld upon the wages paid to an employee by any other method which will require the employer to deduct and withhold upon such wages substantially the same amount as would be required to be deducted and withheld by applying subsection (a) or (c), either with respect to a payroll period or with respect to the entire taxable year.

(i) Additional withholding.—The Secretary or his delegate is authorized by regulations to provide, under such conditions and to such extent as he deems proper, for withholding in addition to that otherwise required under this section in cases in which the employer and the employee agree (in such form as the Secretary or his delegate may by regulations prescribe) to such additional withholding. Such additional withholding shall for all purposes be considered tax required to be deducted and withheld under this chapter.

(j) Noncash remuneration to retail commission salesman.—In the case of remuneration paid in any medium other than cash for services performed by an individual as a retail salesman for person, where the service performed by such individual for such person is ordinarily performed for remuneration solely by way of cash commission an employer shall not be required to deduct or withhold any tax under this subchapter with respect to such remuneration, provided that such employer files with the Secretary or his delegate such information with respect to such remuneration as the Secretary or his delegate may by regulation prescribe.

(k) Tips.—In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included

in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that the tax can be deducted and withheld by the employer, at or after the time such statement is so furnished and before the close of the calendar year in which such statement is furnished, from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer for the purpose of such deduction and withholding) as are under the control of the employer; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (16)(B) of section 3401(a) is applicable may deduct and withhold the tax with respect to such tips from any wages of the employee (excluding tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20. Such tax shall not at any time be deducted and withheld in an amount which exceeds the aggregate of such wages and funds (including funds turned over under section 3102(c) (2) or section 3202(c) (2) minus any tax required by section 3102(a) or section 3202(a) to be collected from such wages and funds.

(l) Determination and disclosure of marital status.—

(1) Determination of status by employer.— For purposes of applying the tables in subsections (a) and (c) to a payment of wages, the employer shall treat the employee asa single person unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after the date of the enactment of this subsection indicating that the employee is married.

(2) Disclosures of status by employee.— An employee shall be entitled to furnish the employee with a withholding exemption certificate indicating he is married only if, on the day of such furnishing, he is married (determined with the application of the rules in paragraph (3)). An employee whose marital status changes from married to single shall, at such time as the Secretary or his delegate may by regulations prescribe, furnish the employer with a new withholding exemption certificate.

(3) **Determination of marital status.**— For purposes of paragraph (2), an employee shall on any day be considered—

(A) as not married, if (i) he is legally separated from his spouse under a decree of divorce or separate maintenance, or (ii) either he or his spouse is, or on any preceding day within the calendar year was, a nonresident alien; or

(B) as married, if (i) his spouse (other than a spouse referred to in subparagraph (A)) died within the portion of his taxable year which precedes such day, or (ii) his spouse died during one of the two taxable years immediately preceding the current taxable year and, employee reasonably expects, at the close of his taxable year, to be a surviving spouse (as defined in section 2(b)).

(m) **Withholding allowances based on itemized deductions.**—

(1) **General rule.**—An employee shall be entitled to withholding allowances under this subsection with respect to a payment of wages in a number equal to the number determined by dividing by $750 the excess of—

(A) his estimated itemized deductions, over
(B) an amount equal to 15 percent of his estimated wages.

For purposes of this subsection, a fractional number shall not be taken into account unless it amounts to one-half or more, in which case it shall be increased to 1.

(2) **Definitions.**—For purposes of this subsection—

(A) Estimated itemized deductions.—The term "estimated itemized deductions" means the aggregate amount which he reasonably expects will be allowable as deductions under chapter 1 (other than the deductions referred to in sections 141 and 151 and other than the deductions required to be taken into account in determining the adjusted gross income under section 62) for the estimation year. In no case shall such aggregate amount be greater than the sum of (i) the amount of such deductions (or the amount of the

standard deduction) reflected in his return of tax under subtitle A for the taxable year preceding the estimation year, and (ii) the amount of his determinable additional deductions for the estimation year.

(B) Estimated wages.—The term "estimated wages" means the aggregate amount which he reasonably expects will constitute wages for the estimation year.

(C) Determinable additional deductions.—The term "determinable additional deductions" means those estimated itemized deductions which (i) are in excess of the deductions referred to in subparagraph (A) (or the standard deduction) reflected on his return of tax under subtitle A for the taxable year preceding taxable year which can reasonably be expected to cause an increase in the amount of such deductions on the return of tax under subtitle A for the estimation year.

(D) Estimation year.—In the case of an employee who files his return on the basis of a calendar year, the term "estimation year" means—

(i) with respect to payments of wages after April 30 and on or before December 31 of any calendar year, such calendar year, and

(ii) with respect to payments of wages on or after January 1 and before May 1 of any calendar year, the preceding calendar year (except that with respect to an exemption certificate furnished by an employee after he has filed his return for the preceding calendar year, such term means the current calendar year).

In the case of an employee who files his return on a basis other than the calendar year, his estimation year, and the amounts deducted and withheld to be governed by such estimation year, shall be determined under regulations prescribed by the Secretary or his delegate.

(3) **Special rules.**—

(A) Married individuals.—The number of

withholding allowances to which a husband and wife are entitled under this subsection shall be determined on the basis of their combined wages and deductions. This subparagraph shall not apply to a husband and wife who filed separate returns for the taxable year preceding the estimation year and who reasonbly expect to file separate returns for the estimation year.

(B) Only one certificate to be in effect.—In the case of any employee, withholding allowances under this subsection may not be claimed with more than one employer at any one time.

(C) Termination of effectiveness.—In the case of an employee who files his return on the basis of a calendar year, that portion of a withholding exemption certificate which relates to allowances under this subsection shall not be effective with respect to payments of wages after the first April 30 following the close of the estimation year on which it is based.

(D) Limitation.—In the case of employees whose estimated wages are at levels at which the amounts deducted and withheld under this chapter generally are insufficient (taking into account a reasonable allowance for deductions and exemptions) to offset the liability for tax under chapter 1 with respect to the wages from which such amounts are deducted and withheld, the Secretary or his delegate may by regulation reduce the withholding allowances to which such employees would, but for this subparagraph, be entitled under this subsection.

(E) Treatment of allowances.—For purposes of this title, any withholding allowance under this subsection shall be treated as if it were denominated a withholding exemption.

(4) Authority to prescribe tables.—The Secretary or his delegate may prescribe tables pursuant to which employees shall determine the number of withholding allowances to which they are entitled under this subsection (in lieu of making such determination under paragraphs (1) and (3)).

Such tables shall be consistent with the provisions of paragraphs (1) and (3), except that such tables—

(A) shall provide for entitlement to withholding allowances based on reasonable wage and itemized deduction brackets, and

(B) may increase or decrese the number of withholding allowances to which employees in the various wage and itemized deduction brackets would, but for this subparagraph, be entitled to the end that, to the extent practicable, amounts deducted and withheld under this chapter (i) generally do not exceed the liability for tax under chapter 1 with respect to the wages from which such amounts are deducted and withheld, and (ii) generally are sufficient to offset such liability for tax.

(n) Employees incurring no income tax liability.—Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter upon a payment of wages to an employee if there is in effect to such payment a withholding exemption certificate (in such form and containing such other information as the Secretary or his delegate may prescribe) furnished to the employer by the employee certifying that the employee—

(1) incurred no liability for income tax imposed under subtitle A for his preceding taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A for hsi current taxable year.

The Secretary or his delegate shall by regulations provide for the coordination of the provisions of this subsection with the provisions of subsection (f).

(o) Extension of withholding to certain payments other than wages.—

(1) General rule.—Forpurposes of this chapter (and so much of subtitle F as relates to this chapter)—

(A) any supplemental unemployment compensation benefit paid to an individual, and

(B) any payment of an annuity t an individual, if at the time the payment is made a request that such

annuity be subject to withholding under this chapter is in effect,

shall be treated as if ti were a payment of wages by an employer to an employee for a payroll period.

(2) Definitions.—

(A) Supplemental unemployment compensation benefits.—For purposes of paragraph (1), the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

(B) Annuity.—For purposes of this subsection, the term "annuity" means any amount paid to an individual as a pension or annuity, but only to the extent that the amount is includible in the gross income of such individual.

(3) Request for withholdings.—A request that an annuity be subject to withholding under this chapter shall be made by the payee in writing to the person making the annuity payments, shall be accompanied by a withholding exemption certificate, executed in accordance with the provisions of subsection (f) (2), and shall take effect as provided in subsection (f) (3). Such a request may, notwithstanding the provisions of subsection (f) (4), be terminated by furnishing to the person making the payments a written statement of termination which shall be treated as a withholding exemption certificate for purposes of subsection (f) (3) (B).

(p) Voluntary withholding agreements.—The Secretary or his delegate is authorized by regulations to provide for withholding—

(1) from remuneration for services performed by an employee for his employer which (without regard to this subsection) does not constitute wages, and

(2) from any other type of payment with respect to which

the Secretary or his delegate finds that withholding would be appropriate under the provisions of this chapter,

if the employer and the employee, or in the case of any other type of payment the person making and the person receiving the payment, agree to such withholding. Such agreement shall be made in such form and manner as the Secretary or his delegate may by regulations provide. For purposes of this chapter (and so much of subtitle F as relates to thsi chapter) remuneration or other payments with respect to which such agreement is made shall be treated as if they were wages paid by an employer to an employee to the extent that such remuneration is paid or other payments are made during the period for which the agreement is in effect.

Aug. 16, 1954, c. 736, 68A Stat. 457; Aug. 9, 1955, c. 666 §2, 69 Stat. 605; Sept. 21, 1961, Pub.L. 87-256, §110(g)(2), 75 Stat. 537; Feb. 26, 1964, Pub.L. 88-272, Title III, §302(a), (b), 78 Stat. 140; July 30, 1965, Pub.L. 89-97, Title III, §313(d)(3)-(5), 79 Stat. 384; Sept. 29, 1965, Pub.L. 89-212, §2(c), 79 Stat. 859; Mar. 15, 1966, Pub.L. 89-368, Title I, §101(a)-(e)(3), 80 Stat. 38; June 28, 1968, Pub.L. 90-364, Title I, §102(c)(1), (2), 82 Stat. 256, 259; June 30, 1969, Pub.L. 91-36, §2(a), 83 Stat. 42; Aug. 7, 1969, Pub.L. 91-53, §6(a) 83 Stat. 96; Dec. 30, 1969, Pub.L. 91-172, Title VIII, §805(a)-(e), (f)(1), (g), 83 Stat. 686, 704-708.

Internal Revenue Code (1971) U.S. Code Congressional and Administrative News Beginning at Page 995 (tables omitted) 1035-1044.

APPENDIX E

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE A. TURNER,
Defendant-Appellant

CAUSE NO. 76-1240

REQUEST TO CLERK TO CERTIFY AND TRANSMIT ENTIRE RECORD

TO: Mr. Edward W. Wadsworth
Clerk of the United States Court of Appeals
for the Fifth Circuit

Pursuant to the provisions of *Rule 12 (1)* of the Rules of the Supreme Court of the United States, you are requested to certify and transmit to the Supreme Court of the United States the entire Record of the proceedings herein including the original Exhibits.

Gloria T. Svanas
GLORIA T. SVANAS
1813 East Eighth Street
Odessa, Texas 79761
Telephone: 915/337-1568

Attorney for Defendant-Appellant
EDDIE A. TURNER

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT a true and correct copy of the foregoing Request to Clerk to Certify and Transmit Entire Record has this 22 day of June, 1977, has been deposited in the United States Mail, postage prepaid, addressed to the following:

Mr. Roger L. McRoberts
Assistant United States Attorney
Room C-201, 1205 Texas Avenue
Lubbock, Texas 79041

Gloria T. Svanas
GLORIA T. SVANAS

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

No. 77-33

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDDIE A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM 1977

No. 77-33

EDDIE A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of willfully supplying false and fraudulent income tax withholding certificates to his employer in 1972 and 1973, in violation of 26 U.S.C. 7205. He was sentenced to six months' imprisonment, placed on probation for 18 months, and fined $500 (R. 292).[1] The court of appeals affirmed *per curiam* (Pet. App. B-1 to B-2).

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[1]The record in this Court consists of six volumes. The original record on appeal, or clerk's transcript, is designated "R." Volumes II, III and IV are supplemental records of pretrial and post-trial proceedings. Volume V, the transcript of trial proceedings, is designated "Tr." Volume VI consists of the proceedings in the court of appeals.

Petitioner contends that the evidence was insufficient to support the verdict and that he is the victim of discriminatory prosecution.

The evidence adduced at trial may be summarized as follows: During 1972 and 1973 petitioner, a tax protester, was employed as a registered nurse-anesthetist by a Plainview, Texas, hospital, at a salary of $1,500 per month (Tr. 209-211, 217, 238-239). In November, 1972, petitioner filed with his employer, an employee's withholding allowance certificate (Form W-4) claiming 20 dependents (Govt. Exs. B-5, C-1; Tr. 219-221, 231, 242-244, 262-263, 267-268). Petitioner advised the hospital's personnel director that he did not want any income tax deducted from his check and that he had joined a "group of people" and would take care of his tax liability at the end of the year as he saw fit (Tr. 221, 231). On the basis of this certificate, the income tax withheld from petitioner's paycheck was reduced from $117.89 to $14.09 (Tr. 222). A fellow employee at the hospital testified that petitioner once told her that he was claiming 20 dependents, including his wife, two children, dogs, horses and other animals that he owned (Tr. 267-268), and that he stated he was part of a national group with "the same thing in mind" and offered to make literature available (Tr. 270).

Two months later, petitioner filed a second false withholding certificate, which claimed 30 allowances and had the effect of reducing the tax withheld to zero (Tr. 223-224). He stated that the 20 allowances had not entirely eliminated the withholding and that he was raising it to 30 in order to eliminate withholding altogether (Tr. 245). Petitioner's 1971 income tax return (Govt. Ex. A-1) shows that petitioner claimed only four exemptions, consisting of himself, his wife, and their two children (Tr. 164-166).

1. Contrary to petitioner's argument (Pet. 6-13), the jury could readily have inferred that petitioner was guilty of filing false withholding certificates. See *United States* v. *Smith*, 487 F. 2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989; *United States* v. *Ducharme*, 505 F. 2d 691, 692 (C.A. 9); *United States* v. *Malinowski*, 472 F. 2d 850, 853 (C.A. 3), certiorari denied, 411 U.S. 970. Indeed, the inference that petitioner willfully falsified the claims of 20, and then 30, allowances is inescapable.

Petitioner's defense was that he might have had allowable deductions sufficient to warrant such a claim. But that would mean that he may have had deductible interest, taxes, charitable contributions, and the like, of $12,000 to $19,500 per year, despite the fact that his gross income was only $18,000 per year. There is no evidence of such deductions.

2. Petitioner also argues (Pet. 13-17) that he was the victim of discriminatory prosecution. In the district court, petitioner moved for a hearing and a judgment of dismissal "upon the grounds that * * * [he was] being subjected to prosecution, in a discriminate manner, for political reasons and for the reason that he has espoused in public * * * his opposition to the federal tax laws, the federal tax policies and the unconstitutional money system in effect in the United States * * *" (R. 88).[2]

Petitioner, describing himself as an "aggressive, loudmouth organizer of tax protestors" (Pet. 17), argues that

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[2]The record does not show the disposition of this motion and it does not appear that petitioner ever pressed the district court for a decision. The motion might well have been denied on the ground that it was filed out of time. On May 6, 1975, the district court, in response to a request by petitioner, granted additional time until May 9, 1975, to file any further motions. The motion was not filed until May 12, 1975 (see R. 95, 100).

this prosecution "infringe[s] upon constitutionally guaranteed freedoms" (Pet. 13). At bottom, this argument amounts to the contention that anyone may violate a federal statute and then insulate himself against prosecution by publicly boasting of his conduct and urging others to follow his example. But the government appropriately may "make an example," by prosecution, of one who urges others to follow his example of criminal conduct. Indeed, such prosecution may be necessary to preserve respect for the law; a prosecution based upon such grounds is not impermissibly selective. Cf. *Oyler* v. *Boles*, 368 U.S. 448, 456; *Edelman* v. *California*, 344 U.S. 357, 359; *Washington* v. *United States*, 401 F. 2d 915, 925 (C.A. D.C.).

Petitioner has not shown that his selection was based on an impermissible ground such as race or religion. Cf. *United States* v. *Oaks*, 527 F. 2d 937, 940 (C.A. 9), certiorari denied, 426 U.S. 952; *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, 424 U.S. 955; *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (C.A. 2); *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (C.A. 8). Nor has he alleged that other taxpayers similarly situated generally have not been prosecuted. In these circumstances, there is no substance to his claim that his prosecution was not undertaken in good faith and in a nondiscriminatory manner. See, *e.g.*, *United States* v. *Falk*, 479 F. 2d 616, 620 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.